No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION
Petitioner,

v.

ZACHARY W. BLAIR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Tennessee's durational residency requirements for retail liquor licenses are unconstitutional because they establish a regulatory regime that discriminates against interstate commerce and non-resident citizens.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because durational residency requirements like those at issue here are contrary to the Founders' vision of promoting united commercial markets and avoiding economic discrimination between in-state and out-of-state residents.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution guarantees citizens' right to engage in interstate commerce free from discriminatory and protectionist state regulations. This fundamental rule stems from the Framers' concern that, left unchecked, states would enact commercial regulations favoring their own residents at the expense of non-residents. Indeed, this Court has time and again struck down state laws that deprive citizens of their right to access the markets of other states on equal terms.

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[1] Rule 37 statement: Petitioner and Respondents have filed blanket consents with the Clerk. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

In striking down discriminatory state commercial regulations, the Court has primarily relied on the dormant Commerce Clause. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As the Court reaffirmed in *Granholm v. Heald*, the Commerce Clause has always applied to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." 544 U.S. 460, 472 (2005). In line with this principle, the Court has also acknowledged the role of the Privileges and Immunities Clause of Article IV, § 2 in securing comity and preventing economic discrimination by ensuring non-resident citizens have "equality of privilege" with resident citizens. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).[2] Together, the Commerce and Privileges and Immunities Clauses ensure citizens of their right to access the markets of other states on equal terms. The statute at issue here, however, contradicts this central constitutional principle.

Tennessee's statute effectively imposes a *nine-year* residency requirement on retail liquor license applicants and, for corporations, a requirement that every officer, director, and stockholder satisfy the nine-year rule. The durational residency requirements flatly prevent non-residents and businesses from competing on the same terms as Tennessee residents.[3] The only

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[2] The terms "citizen" and "resident" are synonymous for purposes of Article IV's Privileges and Immunities Clause. *Austin v. New Hampshire*, 420 U.S. 656, 663 n.8 (1975).

[3] Petitioner has argued that the Privileges and Immunities Clause does not apply to corporations and should not be held applicable to Tennessee's exercise of its police powers over liquor licenses. This argument is not persuasive. Respondent was named as a defendant in a declaratory judgment action and asserted the individual rights of its owners who were

plausible purpose of these onerous requirements is to exclude non-residents from Tennessee's market, thereby protecting in-state retailers from competition. While the Twenty-First Amendment affords states greater flexibility in devising alcohol regulations than regulations for other goods or services, it does not protect state laws that are mere economic protectionism. Tennessee's durational residency requirements are thus blatantly discriminatory and protectionist, in violation of both the Commerce and Privileges and Immunities Clauses.

ARGUMENT

I. THE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE WERE INTENDED TO PROSCRIBE DIFFERENTIAL TREATMENT IN INTERSTATE COMMERCE

A. The Commerce and Privileges and Immunities Clauses Were Adopted to Prevent Economic Divisions Between States

The Framers adopted the Commerce and Privileges and Immunities Clauses with the express intent of avoiding the "tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979). Under the Articles, the practice of some states denying equal treatment to outlanders was

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unconstitutionally deprived of the opportunity to obtain a liquor license solely because they were not Tennessee residents. Furthermore, this Court has never ruled that the Privileges and Immunities Clause does not apply to members of limited liability companies.

widespread. *See Austin v. New Hampshire*, 420 U.S. 656, 660 (1975). Alexander Hamilton wrote that "regulations of trade by which particular States might endeavor to secure exclusive benefits to their own citizens...naturally lead to outrages, and these to reprisals and wars." The Federalist No. 7 (Hamilton). Discriminatory state laws ultimately served as a catalyst for the Federal Convention of 1787. *See* Gordon S. Wood, *The Creation of the American Republic, 1776-1787*, 463–67 (1969) (describing how state economic regulations created a fundamental political crisis).

To cure the ills of the Articles of Confederation, the Framers adopted specific constitutional provisions designed to prevent differential treatment between state residents and non-residents. The Commerce Clause provides Congress with the power "to regulate Commerce with foreign Nations, and among the several States, and with the Native American Tribes." U.S. Const. art. I, sec. 8, cl. 3. The Framers believed a main function of the Commerce Clause was to restrain state power to impose discriminatory regulations on interstate commerce. *See Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951) (averring the Commerce Clause was adopted to prohibit a "multiplication of preferential trade areas"). James Madison wrote that this central provision of the Constitution

> grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a *negative and preventive provision* against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Max Farrand, *Records of the Federal Convention of 1787*, 478 (2d ed. 1937).

The same historical reasons underlying the Commerce Clause led to the adoption of the Privileges and Immunities Clause, which reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," U.S. Const. art. IV, sec. 2, cl 1. For Madison, the purpose of the Clause is to ensure that "[t]hose who come under the denomination of free inhabitants of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of free citizens of the latter." The Federalist, No. 42 (Madison). Hamilton praised the Privileges and Immunities Clause as "the esteemed basis of the Union" because it secured "the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled." The Federalist No. 80 (Hamilton).

Together, the Commerce and Privileges and Immunities Clauses illustrate the Framers' express intent of national uniformity in interstate commerce. These two central constitutional provisions, one a concurrent grant of power to the federal government and the other an express restraint on state power, work in tandem to proscribe economic discrimination between the states and promote national commercial harmony.

B. The Commerce Clause and Privileges and Immunities Clause Have a "Mutually Reinforcing" Relationship

In *Hicklin v. Orbeck*, the Court described the Privileges and Immunities Clause of Article IV and the Commerce Clause as having a "mutually reinforcing relationship." 437 U.S. 518, 531 (1978). This

relationship stems from their common origin and shared vision of federalism. *See Baldwin v. Mont. Fish & Game Comm'n*, 436 U.S. 371, 379–80 (1978); *see also Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 279–80 (1985).

Although the Commerce Clause and Privileges and Immunities Clause are found in different sections of the Constitution, their separation is one of form, not substance. Seeing as the former is an express *grant* of power to Congress and the latter is an express *limitation* on state power, the Framers separated them accordingly. *Baldwin*, 436 U.S. at 379–80; *cf. United Bldg. & Constr. Trades Council of Camden County v. City of Camden*, 465 U.S. 208, 220 (1982) (Rehnquist, C.J.) (distinguishing the Commerce Clause's "implied restraint" from the Privileges and Immunities Clause's "direct restraint").

Given the historical connection between the Commerce and Privileges and Immunities Clauses, it is unsurprising that courts have repeatedly found a reciprocal relationship between them. Moreover, the Court has recurrently invoked both clauses in cases implicating economically discriminatory state regulations. *See, e.g., Hillside Dairy Inc. v. Lyons*, 539 U.S. 59 (2003); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 570 n.4 (1997); *United Bldg. & Constr. Trades Council of Camden County*, 465 U.S. 208; *Zobel v. Williams*, 457 U.S. 55, 66 (1982) (Brennan, J., concurring); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 68–69 (1824); *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Penn. 1823) (No. 3,230) (Washington, Circuit Justice);

As a result of their common origin in the Articles of Confederation and their shared purpose, the Commerce and Privileges and Immunities Clauses mutually reinforce the constitutional norm that the states are forbidden from discriminating against out-of-state residents in interstate commerce.

II. STATE REGULATION OF ALCOHOL IS LIMITED BY THE NON-DISCRIMINATION PRINCIPLE OF THE COMMERCE CLAUSE, WHICH TENNESSEE'S DURATIONAL RESIDENCY REQUIREMENTS VIOLATE

A. The Court Has Already Held That The Twenty-First Amendment Does Not Insulate State Liquor Laws From Commerce Clause Scrutiny

In *Bacchus Imports, Ltd. v. Dias*, the Court firmly established that the Commerce Clause limits states' power under the Twenty-First Amendment. 468 U.S. 263 (1984); *see also Healy v. Beer Inst.*, 491 U.S. 324 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986). The Court noted that "[i]t is by now clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." 468 U.S. at 275. "To draw a conclusion that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would...be an absurd oversimplification." *Id.* (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331–32 (1964)). A mere 13 years ago the Court again emphasized in *Granholm v. Heald* that states' regulation of alcohol under the Twenty-first Amendment "is limited by the nondiscrimination principle of the Commerce

Clause." 544 U.S. at 487. In reviewing the history preceding the Twenty-First Amendment and its prior decisions interpreting the amendment, the Court made it clear that it is not limited to alcohol "products" or "producers," and extends to out-of-state business interests. *Id.* at 486–89.

The Court has recognized on numerous occasions that the negative Commerce Clause proscribes "differential treatment of in-state and out-of-state economic interests that benefits the former and disadvantage the latter." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994); *see also New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–74 (1988) (applying the long-standing constitutional rule that "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" are prohibited under the "'negative' aspect of the Commerce Clause"). When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the Court has struck down the statute without further inquiry. *See Brown-Forman Distillers Corp.*, 476 U.S. at 579. This mandate reflects the Framers' central concern in avoiding the tendencies toward economic Balkanization that had plagued relations among the states under the Articles of Confederation. *Hughes*, 441 U. S. at 325–26. The rule of non-discrimination in interstate commerce ensures rivalries among the states are thus kept to a minimum, and a proliferation of trade zones is prevented. *See C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994) (citing The Federalist No. 22, (Hamilton)).

The implicit limitations on states' power imposed by the Commerce Clause in no way proscribes states

from enacting broad, universally applicable regulations. *See Granholm*, 544 U.S. at 493. To be sure, state policies are generally protected by the Twenty-First Amendment when they are non-discriminatory and evenhanded. *Id.*. Even a state that chooses to ban the sale and consumption of alcohol altogether could bar its importation entirely without running afoul of the Commerce Clause—and, as history shows, it would have to do so to make its laws effective. *Id.* at 488–89. It is also firmly established that states may assume control of liquor distribution through state-run outlets or funnel sales through the three-tier system, which the Court has recognized as "unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1986). Although states enjoy broad powers under the Twenty-First Amendment, they are not without limits. When a state exercises regulatory power over the sale of alcohol in a way that discriminates against out-of-staters, "[t]he discriminatory character [of the challenged statute] eliminates the immunity afforded [to the State] by the Twenty-first Amendment." *Healy*, 491 U.S. at 344 (Scalia, J., concurring).

The Court's recent application of the non-discrimination principle in *Granholm* to prohibit differential treatment of out-of-state businesses in the alcohol trade confirms that Commerce Clause principles apply beyond just liquor products, extending to the treatment of those involved in the liquor market as well. This follows because alcohol products cannot be separated from the people and businesses that produce and sell them. The present case involves straightforward attempts to discriminate in favor of local retailers. Such blatant protectionism is contrary to the non-discrimination principles recognized by this Court's

Commerce Clause jurisprudence. Thus, the Twenty-First Amendment cannot save Tennessee's statute.

B. Tennessee's Licensing Statute Is Discriminatory on Its Face

In deciding whether a state regulation violates the dormant Commerce Clause, the Court determines whether the law facially discriminates against out-of-state actors or has the effect of favoring in-state economic interests over out-of-state interests. *Brown-Forman Distillers Corp.*, 476 U.S. at 579. Discriminatory laws are subject to a "per se rule of invalidity." *Philadelphia*, 437 U.S. at 624. This presumption can only be overcome by showing that the state has no other way to advance a legitimate local purpose, such as "promoting temperance, ensuring orderly market conditions, and raising revenue." *North Dakota*, 495 U.S. at 432.

The discriminatory nature of the Tennessee licensing statute is obvious. Under the statute, in order to obtain a retail liquor license, an individual must have "been a bona fide resident of Tennessee during the two-year period immediately preceding the date upon which application is made." Tenn. Code Ann. §57-3-204(b)(2)(A). The next clause provides that licenses, once granted, cannot be renewed unless the applicant has been a Tennessee resident "for at least ten (10) consecutive years." *Id.* Since liquor licenses in Tennessee are only valid for one year after issuance, Tenn. Code Ann. §57-3- 213(a), the renewal requirement effectively imposes a *nine-year* waiting period.

By essentially requiring out-of-staters to wait nine years to obtain a liquor license, the Tennessee statute establishes a barrier of entry to the state's retail liquor market. *See Cooper v. McBeath*, 11 F.3d 547, 553 (5th

Cir. 1994) (characterizing a similar residency requirement as an "impenetrable barrier to entering the Texas liquor industry"). In *Lewis v. BT Investment Managers, Inc*, the Court struck down a Florida statute because it "overtly prevent[ed] [out-of-state] enterprises from competing in local markets." 447 U.S. 27, 39 (1980). The Court explained that the statute posed an "explicit barrier" to "out-of-state firms with the kinds of resources and business interests that make them likely to attempt de novo entry." *Id.* If a statute absolutely prohibits entry into an industry by non-residents, then it necessarily discriminates against out-of-state economic interests. *See Granholm*, 544 U.S. at 473 (stating that laws violate Commerce Clause principles when "[t]hey deprive citizens of their right to have access to the markets of other States on equal terms"). Such a blanket prohibition is the most extreme form of economic protectionism. *See BT Investment Managers, Inc.*, 447 U.S. at 42.

Even Tennessee has expressly acknowledged the discriminatory nature of its durational residency requirements in recent attorney general opinions *E.g.*, BIO App. 8a, 11a-12a (concluding that the residency requirements "constitute trade restraints and barriers"). The district court below also determined that the requirements create a "barrier" for non-residents, who "will always be unable to obtain a retail liquor license." *Id.* at 74a. The court of appeals then correctly determined that Tennessee's durational residency requirements are "facially discriminatory." Pet. App. 31a.

As discussed above, the Twenty-First Amendment cannot save Tennessee's discriminatory statute since the "central purpose of the [Twenty-First Amendment] was not to empower States to favor local liquor

industries by erecting barriers to competition." *Bacchus*, 468 U.S. at 276. The type of discriminatory durational residency requirements at issue in the present case contradict these principles. They deprive citizens of their right to have access to the markets of other states on equal terms. Allowing states to discriminate against out-of-state residents in liquor licensing invites preferential treatment for in-state retailers, an outcome destructive of the very purpose of the Commerce Clause. *See Dean Milk Co.*, 340 U. S. at 356. Accordingly, under the Court's Commerce Clause precedents, Tennessee's discriminatory residency requirements for liquor licenses are subject to "a virtually per se rule of invalidity." *Philadelphia*, 437 U.S. at 624.

C. Tennessee's Durational Residency Requirements Do Not Serve a Legitimate Local Purpose

Tennessee's durational residency requirements serve no other purpose than pure economic protectionism. The Court's Commerce Clause jurisprudence place a high burden on states to show discriminatory laws are justified by a legitimate state purpose. *See Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 344 (1992) (stating the "burden is on the State to show that 'the discrimination is demonstrably justified.'"). A discriminatory state regulation can only be upheld if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U.S. at 278. The Court has "upheld state regulations that discriminate against interstate commerce *only after* finding, based on concrete record evidence, that a state's nondiscriminatory alternatives will prove unworkable." *Granholm*, 544 U.S. at 493. Moreover, in

deciding whether to invalidate state alcohol statutes, courts examine the "core concerns" of the Amendment. *See North Dakota*, 495 U.S. at 432 (identifying "the interest of promoting temperance, ensuring orderly market conditions, and raising revenue").

Tennessee has consistently pointed to its state interests asserted in the statement of legislative intent, namely protecting the "health, safety and welfare" of Tennessee citizens, and ensuring "oversight, control and accountability" for retail store owners and managers. *See* Tenn. Code Ann. § 204(b)(4). However, the Tennessee legislature did not add this statement until 2014 following a formal ruling by the state attorney general that the residency requirements were unconstitutional. Back in 2012, the state attorney general conceded that the legislative history of the statute in question pointed to protectionist motives and admitted that he could not "conceive" of a legitimate purpose for the requirements. BIO App. 8a, 11a. He further concluded that the state legislature did not "establish a local purpose sufficient to justify the discriminatory licensing provisions" and that the residency requirements "cannot be related to any kind of regulatory or public-safety concern" since they do nothing to address such concerns. *Id.* at 13a, 17a.

The district court below looked to the justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014, two years after the Tennessee attorney general had formally ruled on the residency requirements. The district court stated that it "fail[ed] to see how the retailer residency requirements" advance Tennessee's purported interests. *Id.* at 80a. Based on the concrete record evidence, the district court below concluded that the state interests asserted in the

statement of legislative intent were insufficient to justify the statute's blatant discrimination. Pet. App. 31a-33a, 76a-80a.

The court of appeals majority reached the same conclusion. It correctly found that the Tennessee statute serves no legitimate local purpose that could not be readily served by other nondiscriminatory licensing requirements. *See* Pet. App. at 32a-33a (describing such alternatives). In *Granholm*, this Court similarly rejected the argument that a discriminatory state law was justified simply because the states "ha[d] greater regulatory control over in-state producers than over out-of-state wineries." 544 U.S. at 490. Moreover, lawmakers in Michigan and New York had alternative methods to pursue their legitimate goals. *Id.* at 490–91 ("[T]he States can take less restrictive steps to minimize the risk that minors will order wine by mail."). The Court further noted that "improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail." *Id.* at 492. These alternative means are equally applicable to Tennessee here.

Petitioner here has failed to meet its evidentiary burden to show that the discriminatory durational residency requirements protect "the health, safety, and welfare" of its citizens. *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 625 (6th Cir. 2018); *see also* Tenn. Code Ann. § 57-3-204(b)(4)). The only conceivable purpose of the durational requirements is to exclude non-residents from Tennessee's market and protect in-state retailers from competition. None of the proffered justifications for the statute establish a

nexus between the exclusion of non-resident applicants and promoting a legitimate state interest. Nondiscriminatory alternatives could just as well achieve the purposes of citizen health and alcohol regulation. Thus, Tennessee's durational residency statute serves no legitimate local regulatory purpose and is unconstitutional.

III. THE TWENTY-FIRST AMENDMENT DOES NOT PERMIT STATES TO VIOLATE OTHER SUBSTANTIVE CONSTIUTIONAL PROVISIONS, INCLUDING THE PRIVILEGES AND IMMUNITIES CLAUSE

A. The Twenty-First Amendment Does Not Save State Laws That Violate Other Constitutional Provisions

The Twenty-First Amendment grants to the states special authority to regulate alcoholic beverages in ways that would otherwise be reserved to the federal government under the Commerce Clause. Section 2 expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, sec. 2. But those words do not give states a blank check to regulate alcohol in violation of other parts of the Constitution.

Section 2 of the Twenty-First Amendment limits the effect of the dormant Commerce Clause on a state's regulatory authority over the *delivery or use* of alcoholic beverages within its borders, but "the Amendment does not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712

(1984); *Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful."); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U. S. 484, 515 (1996) ("while [the Twenty-first Amendment] grants the States authority over commerce that might otherwise be reserved to the Federal Government, it places no limit whatsoever on other constitutional provisions.").

The Court has already acknowledged several areas in which the Twenty-First Amendment is subject to other constitutional provisions, including the First Amendment, *44 Liquormart, Inc.*, 517 U.S. 484 (1996); Establishment Clause, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); Supremacy Clause, *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112-114 (1980); Equal Protection Clause, *Craig*, 429 U.S. at 204–09; Due Process Clause, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); and Import-Export Clause, *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

To understand what the Twenty-First Amendment does not allow, the Court can, as it has in the past, look to the broader constitutional framework and the substantive protections found therein. Tennessee could have, in line with its explicit authority under the Twenty-First Amendment, enacted a wholesale ban of all in-state liquor. Instead, the state chose to use a three-tiered distribution system and license its liquor retailers. In so doing, Tennessee subjected its regulatory scheme to scrutiny under other constitutional provisions, such as the Privileges and Immunities Clause. After all, the Twenty-First Amendment was not

designed to "save" state laws from constitutional scrutiny. *See Healy*, 491 U.S. at 344 (Scalia, J., concurring).

B. The Twenty-First Amendment Does Not Save Discriminatory Laws That Violate the Privileges and Immunities Clause

The Privileges and Immunities Clause of Art. IV, § 2, cl. 1, provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The Clause establishes a norm of comity that guarantees equality of treatment to non-resident citizens of one state coming within the jurisdiction of another. By making non-residence an improper basis for imposing a state regulatory burden, the Clause implicates both the individual right to non-discriminatory treatment and the structural balance between states that is essential to the concept of federalism. *Austin*, 420 U.S. at 662.

On numerous occasions the Court has struck down laws under the Privileges and Immunities Clause that were enacted for the protectionist purpose of discriminating against out-of-state residents. Several of these cases involved state laws precluding non-residents from obtaining licenses or practicing certain occupations. The Clause has an expansive reach in the realm of commercial regulations, especially when those regulations create discriminatory resident classifications.

The first such case was *Ward v. Maryland*, in which the Court struck down a statute under which non-residents were required to pay $300 per year for a license to trade in goods not manufactured in Maryland, while resident traders paid a fee varying from $12 to $150. 79 U.S. 418. Maryland attempted to justify the disparity as a "tax upon a particular business or trade,

carried on in a particular mode," rather than a discrimination against traders from other states. *Id.* at 422. The Court ultimately held that the discriminatory licensing fees violated the guarantee of the Privileges and Immunities Clause against "being subjected to any higher tax or excise than that exacted by law of...permanent residents." *Id.* at 430.

The Court has also invalided state laws that imposed discriminatory licensing requirements. In *Toomer v. Witsell*, for example, the Court struck down a state statute imposing a $2,500 license fee on out-of-state shrimping boats and only a $25 fee on in-state shrimping boats where purpose and effect of the statute was not to conserve shrimp, but to exclude non-residents and create a commercial monopoly for South Carolina residents. 334 U.S. at 385, 395, 397.

The Court has struck down multiple state statutes that precluded non-residents from obtaining a license to practice an occupation. In 1985, the Court struck down a residency requirement for admission to the state bar of New Hampshire. *See Piper*, 470 U.S. at 274. After discussing the prior case law, the Court found that "like the occupations considered in our earlier cases, the practice of law is important to the national economy." *Id.* at 281. Therefore, the right to obtain a law license was protected by the Privileges and Immunities Clause. *Id.*

Moreover, the Court has repeatedly invalidated laws that unduly obstruct freedom of enterprise. In *United Building & Constr. Trades Council of Camden Cty. v. Mayor and Council of Camden*, the Court invalidated a New Jersey municipal ordinance requiring that at least 40 percent of employees of contractors and subcontractors working on city construction projects

be city residents. 465 U.S. 249. The Court found that the regulation facially burdened out-of-state citizens' ability to pursue a common calling and was thus subject to Privileges and Immunities Clause review because of its unequal effect on out-of-state citizens. *Id.* Finally, in *Hicklin v. Orbeck*, the Court struck down a statute containing a resident-hiring preference for all employment related to the development of the state's oil and gas resources. 437 U.S. at 526–31.

The clear aim of the statutes at issue in each of these cases was to advantage in-state residents and commercial interests at the expense of their out-of-state counterparts. The Court appropriately recognized that these protectionist and discriminatory laws violated the Privileges and Immunities Clause. Similarly, Tennessee's durational residency requirements at issue here fit neatly within this Court's prior Privileges and Immunities Clause jurisprudence.

C. Tennessee's Durational Residency Requirements Violate the Privileges and Immunities Clause

As underscored in *Toomer*, the Privileges and Immunities Clause "guarantees to citizens of State A" the right "of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396. Thus, a primary purpose of the Privileges and Immunities Clause is to "outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398; *see also Hicklin*, 437 U.S. at 526. Discriminatory classifications based on residence must have a substantial reason and bear a substantial relationship to the state's objective. *Piper*, 470 U.S. at 284. While

Petitioner and their amici offer several justifications for the discriminatory treatment of non-resident applicants for retail liquor licenses, none can satisfy this exacting standard of scrutiny required by the Privileges and Immunities Clause.

Tennessee's durational residency requirements essentially create two classes of persons: those who have been within the state for the prescribed period and those who have not. Requiring non-residents to wait *nine years* to obtain a liquor license creates a clear class distinction. The consequential effect of the requirements is to favor one class (in-state Tennessee residents) and disfavor another (non-residents) in the retail liquor trade.

Furthermore, Tennessee's durational residency requirements do not relate to the state's purported objectives of protecting the health, safety and welfare of its citizens. The requirements do not directly regulate the flow of alcoholic beverages within the state. Instead, they regulate the flow of *individuals* who can and cannot engage in economic activities. In the courts below, Petitioner provided no evidence that non-residents are the source of any "peculiar source of evil." *See Toomer*, 334 U.S. at 398; *see also Hicklin*, 437 U.S. at 526. Petitioner also failed to show a substantial reason for the discriminatory durational residency requirements. Instead, Petitioner relied on the self-serving justifications that the Tennessee legislature added to section 57-3-204(b)(4) in 2014. None of these can satisfy the exacting standard of scrutiny required by the Privileges and Immunities Clause.

Tennessee's discriminatory durational residency requirements deny non-residents the opportunity to apply for a retail liquor license on equal footing with

citizens of Tennessee. Accordingly, the requirements violate the Privileges and Immunities Clause.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed. If the Court vacates the decision below, it should remand for consideration of a Privileges and Immunities Clause challenge to Tennessee's discriminatory durational residency requirements.

Respectfully submitted,

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